No. 22-1660

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JOSE REYES, *et al.*,

Plaintiffs-Appellants

v.

WAPLES MOBILE HOME PARK, *et al.*,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PLAINTIFFS-APPELLANTS AND URGING REVERSAL ON THE ISSUE ADDRESSED HEREIN

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INTEREST OF THE UNITED STATES

The United States has a significant interest in the resolution of this appeal, which raises an important question regarding the intersection of the Fair Housing Act's (FHA) prohibition of discrimination based on a disparate impact theory of liability, 42 U.S.C. 3604(a), and a federal criminal anti-harboring statute, 8 U.S.C. 1324(a)(1)(A)(iii). The Department of Justice and Department of Housing and Urban Development (HUD) share enforcement authority under the FHA. See 42 U.S.C. 3610, 3612, 3614. HUD has regulations implementing the FHA's

prohibition of disparate impact discrimination. See 24 C.F.R. 100.500 (2013); 86 Fed. Reg. 33,590 (June 25, 2021). Furthermore, HUD and the Department of Justice have a long history of enforcing the FHA's prohibition of disparate impact discrimination. See U.S. Amicus Br., *Texas Dep't of Hous. & Cmty. Affairs* v. *Inclusive Communities Project, Inc.*, 576 U.S. 519 (2015) (No. 13-1371); 78 Fed. Reg. 11,460, 11,461 n.12 (Feb. 15, 2013) (citing cases). The Department of Justice also enforces the criminal anti-harboring statute.

The United States files this brief under Federal Rule of Appellate Procedure 29(a)(2).

STATEMENT OF THE ISSUE

The defendants in this case have a policy of verifying the immigration status of all adults residing in their mobile home park. The plaintiffs alleged that this policy had a discriminatory disparate impact on Latinos, in violation of the FHA, 42 U.S.C. 3604(a). The defendants countered that their policy was necessary to avoid criminal liability for harboring under 8 U.S.C. 1324(a)(1)(A)(iii). The United States will address the following question only:

Whether the district court erred in concluding that defendants satisfied their burden under step two of the FHA's disparate impact burden-shifting test by showing that their verification policy was necessary to avoid liability for harboring

under Section 1324(a)(1)(A)(iii), without determining whether defendants knew or recklessly disregarded its tenants' unlawful immigration statuses.[1]

STATEMENT OF THE CASE

1. Legal Background

a. The Fair Housing Act

Enacted in 1968, the FHA "broadly prohibits discrimination in housing throughout the Nation." *Gladstone Realtors* v. *Village of Bellwood*, 441 U.S. 91, 93 (1979). Among other things, the FHA makes it unlawful "[t]o refuse to sell or rent * * * or otherwise make unavailable or deny, a dwelling to any person because of race, color, * * * or national origin." 42 U.S.C. 3604(a). A violation of this provision may be established either through a disparate treatment theory, which requires proof that a housing provider or other defendant acted with a discriminatory intent or motive, or a disparate impact theory, where a housing decision is shown to have an unjustified discriminatory effect on a protected class. See *Reyes* v. *Waples Mobile Home Park Ltd. P'ship*, 903 F.3d 415, 421 (4th Cir. 2018), cert. denied, 139 S. Ct. 2026 (2019).[2]

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[1] The United States takes no position on any other issue or on any other potential valid interests that could justify a landlord's immigration verification policy. The United States' decision to address only one question in this appeal should not be construed as endorsing anything else in the district court's decision.

[2] This case previously was appealed to this Court.

In 2013, HUD issued a regulation establishing the "[b]urdens of proof in discriminatory effects cases." 78 Fed. Reg. 11,460, 11,482 (Feb. 15) (24 C.F.R. 100.500 (2013 Rule)); see also 24 C.F.R. 100.500(c) (2013). Under this framework: (1) a plaintiff must come forward with a prima facie case of disparate impact by proving that the challenged policy "caused or predictably will cause a discriminatory effect" on a protected class (step one); (2) then the burden shifts to the defendant to prove that the "challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests" (step two); and (3) if the defendant satisfies its burden under step two, the plaintiff, in order to prevail, must prove that the defendant's interest in "the challenged practice could be served by another practice that has a less discriminatory effect" (step three). 24 C.F.R. 100.500(c)(1)-(3) (2013).

In 2015, the Supreme Court decided *Texas Department of Housing & Community Affairs* v. *Inclusive Communities Project*, *Inc.*, 576 U.S. 519, 545 (2015), confirming that disparate impact claims are cognizable under the FHA. Because the question was not before it, the Court did not rule on deference to HUD's 2013 regulation, but the Court cited the regulation's burden-shifting framework for analyzing such claims throughout its analysis. See, *e.g*., *id.* at 527 (citing 24 C.F.R. 100.500(c) (2014)). Subsequent decisions have read *Inclusive Communities* as approving or implicitly adopting HUD's approach in the 2013

Rule. See *Reyes*, 903 F.3d at 424 n.4 ("The HUD regulation is similar to the framework the Supreme Court ultimately adopted in *Inclusive Communities*, and indeed, some courts believe the Supreme Court implicitly adopted the HUD framework altogether."). As relevant here, the Court agreed with HUD that step two of the framework is "analogous to the business necessity standard under Title VII." *Inclusive Communities*, 576 U.S. at 541 (citing 78 Fed. Reg. at 11,470). Thus, the Court explained, under step two, a defendant has "leeway to state and explain the valid interest served by" the challenged policy. *Ibid*. And the defendant has the burden to "prove" that the policy "is necessary to achieve a valid interest." *Ibid.* This description of the defendant's burden is consistent with the 2013 Rule. See 24 C.F.R. 100.500(c)(2) (2013) (providing that "the respondent or defendant has the burden of proving that the challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the respondent or defendant").[3]

[3] In 2020, HUD published a rule titled "HUD's Implementation of the Fair Housing Act's Disparate Impact Standard," 85 Fed. Reg. 60,288 (Sept. 24) (2020 Rule), which repealed and replaced the 2013 Rule with significantly altered burden-shifting standards for disparate impact claims. Before the rule could take effect, a district court issued a preliminary injunction staying implementation and enforcement of that rule. See *Massachusetts Fair Hous. Ctr*. v. *HUD*, 496 F. Supp. 3d 600, 603 (D. Mass. 2020). After reconsidering the 2020 Rule, HUD has proposed re-codifying the 2013 Rule, which remains in effect due to the preliminary injunction. See 86 Fed. Reg. 33,590 (June 25, 2021). HUD is currently considering the comments received on that proposal.

b. The Federal Anti-Harboring Law And Relevant Fourth Circuit Case Law

The anti-harboring provision of the Immigration Reform and Control Act of 1986 (IRCA) establishes criminal penalties for any person who "knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of the law, conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, such alien in any place, including any building or any means of transportation." 8 U.S.C. 1324(a)(1)(A)(iii).

This Court in *United States* v. *Aguilar*, 477 F. App'x 1000 (4th Cir. 2012) (unpublished), addressed Section 1324(a)(1)(A)(iii)'s "knowing or in reckless disregard" element in a case involving a landlord. The landlord, who was convicted on multiple counts of harboring individuals in her home, challenged the sufficiency of the evidence supporting the jury's finding that she possessed the requisite mens rea. See *id.* at 1002. The Court rejected that challenge, explaining that a "defendant acts with reckless disregard where she is aware of but consciously ignores facts and circumstances clearly indicating that an individual is an undocumented alien." *Ibid.* The Court found that "substantial evidence" supported the jury's finding that the landlord "recklessly disregarded the risk that each of her tenants was an undocumented alien." *Id.* at 1003. Such evidence included the landlord's admission "at trial that she knew that numerous of her

tenants were illegal aliens when immigration 'showed up'—which the jury was entitled to infer was a reference to federal authorities' first visit, several months before her tenants were eventually removed from her residence" and that "'it was the same' to her whether her tenants possessed proper documentation or did not." *Ibid.* It also included evidence that the landlord "took no steps to ascertain the status of her tenants even after" federal authorities "repeatedly" warned her that "numerous of her tenants were not properly documented." *Ibid.*

2. Facts And Prior Proceedings

a. Plaintiffs are four married couples from El Salvador and Bolivia who resided at Waples Mobile Home Park in Fairfax, Virginia. See *Reyes*, 903 F.3d at 419-420. Tenants at the park own the mobile homes in which they live and lease the lots under their homes. JA50.[4]

Before 2015, defendants (collectively, Waples) had a policy that tenants must provide documentation of their lawful status in the United States but, at the time, required only individuals signing the rental lease to provide such verification. JA1512-1513. In 2015, following an incident involving a registered sex offender (not an undocumented immigrant) who was a tenant at another mobile home park

[4] "JA__" refers to the page number of the Joint Appendix that was filed with the plaintiffs-appellants' opening brief. "Doc. __, at __" refers to the docket entry number of documents filed on the district court's docket.

that Waples operated, Waples started enforcing its immigration verification policy by requiring all adult tenants to provide documentation of their lawful status in the United States in order to renew a lease. See *Reyes*, 903 F.3d at 419-420; JA1513 n.2; Doc. 138, at 5. The four male plaintiffs were able to provide the required documentation, but their wives were not. *Reyes*, 903 F.3d at 420. Consequently, Waples refused to renew the leases of all four couples with the same lease terms. *Ibid.* Their leases were converted to more expensive month-to-month leases. *Ibid.* According to Waples, the higher rent was meant to "incentivize the tenants who did not comply with the Policy to vacate their homes in lieu of initiating eviction proceedings." JA1513 n.3. Plaintiffs and their children, who are U.S. citizens, ultimately left the mobile home park. Doc. 256, at 11; see also *Reyes*, 903 F.3d at 420.

b. In 2016, plaintiffs sued Waples, alleging, among other claims, that Waples's policy requiring all adult residents to provide documentation of their lawful presence discriminated against them based on race or national origin in violation of the FHA, 42 U.S.C. 3604(a)-(c). JA68-75. The complaint specifically alleged that Waples's policy "inflict[ed] disproportionate harm on Latinos as compared to similarly situated non-Latinos" at the mobile home park. JA68. Plaintiffs sought declaratory and injunctive relief as well as damages. JA75-76.

The district court initially disposed of plaintiffs' FHA disparate impact claim at the motion to dismiss stage and later granted summary judgment to Waples, treating plaintiffs' FHA claim as a disparate treatment claim. See *Reyes*, 903 F.3d at 422. Plaintiffs appealed, arguing that the district court erred by failing to address their FHA claim under a disparate impact theory. See *ibid.* This Court held that, under *Inclusive Communities*, plaintiffs sufficiently alleged a prima facie case of discrimination based on a disparate impact theory and remanded for the district court to reconsider the parties' cross-motions for summary judgment. *Id.* at 433.

On remand, the district court sua sponte ordered supplemental briefing on several issues, including issues relating to whether Waples satisfied step two of the FHA's burden-shifting test for discrimination claims based on a disparate impact theory. JA1419-1422. In its motion for summary judgment, Waples had asserted that its "policy requiring proof of legal presence in the United States serves a valid interest of avoiding potential criminal liability for harboring 'illegal aliens' under the Fourth Circuit's interpretation" of the IRCA's anti-harboring provision in *Aguilar*. JA1420. The court asked the parties to address, among other questions, "whether avoiding the risk of criminal liability under the IRCA and *Aguilar* is a valid interest at Step Two of *Inclusive Communities*." JA1420.

c. Following supplemental briefing, the district court granted summary judgment to Waples. JA1527. The court held that although there were genuine issues of material fact as to whether plaintiffs established a prima facie case of disparate impact, Waples was entitled to summary judgment because Waples met its burden under step two of the burden-shifting test while plaintiffs failed to satisfy step three. JA1519, 1525, 1527.

As relevant here, the district court concluded that "implementing a policy to avoid increased criminal liability under the anti-harboring statute is a valid and necessary interest that satisfie[d]" step two. JA1525. According to the district court, it was "undisputed" that Waples rented to undocumented individuals, and Waples "cannot be forced to hope" that it would not be prosecuted for harboring like the landlord in *Aguilar*. JA1523. The court then declared that "the facts of the *Aguilar* case make it clear that the Department of Justice will pursue criminal charges against a lessor of housing who does not take affirmative steps to verify the authorization of those [unauthorized] immigrants." JA1523-1524. The district court further explained that the language of Section 1324(a)(1)(A)(iii) underscored that Waples "could face criminal liability." JA1524. The court stated that because Black's Law Dictionary defines "[h]arboring" as "the act of affording lodging, shelter, or refuge to a person," "housing and collecting rent from unauthorized

aliens are predicates of the criminal act for which [Waples] could face liability." JA1524.

SUMMARY OF ARGUMENT

The district court erred in its analysis when it concluded that Waples met its burden under step two of the FHA's burden-shifting test for disparate impact claims. JA1522-1524. Under step two, Waples had an opportunity to "state and explain the valid interest served by" its immigration verification policy and had the burden of showing that the policy was "necessary to achieve [that] valid interest." *Texas Dep't of Hous. & Cmty. Affairs* v. *Inclusive Communities Project, Inc.*, 576 U.S. 519, 541 (2015). In concluding that Waples satisfied step two, however, the district court failed to properly analyze whether Waples was at risk for criminal liability for harboring such that it was justified in asserting that interest as a legitimate reason for adopting the verification policy.

Although avoiding criminal liability is a valid interest, residential landlords do not ordinarily risk exposure to liability under 8 U.S.C. 1324(a)(1)(A)(iii) merely for failing to proactively verify their tenants' immigration statuses. Among other things, that statute requires proof that a landlord acted "knowing[ly] or in reckless disregard" of a tenant's unlawful immigration status. 8 U.S.C. 1324(a)(1)(A)(iii). Thus, in this case, the district court could not properly have found that Waples's policy was necessary to avoid a reasonable risk of criminal liability without

considering whether Waples knew or recklessly disregarded that its tenants were undocumented. The district court's failure to conduct this fact-bound analysis was error.

The district court's reliance on *United States* v. *Aguilar*, 477 F. App'x 1000 (4th Cir. 2012) (unpublished), was misguided. Under *Aguilar*, a "defendant acts with reckless disregard where she is aware of but consciously ignores facts and circumstances clearly indicating that an individual is an undocumented alien." 477 F. App'x at 1002. In that case, a jury heard evidence that the landlord "admit[ted] at trial that she knew that numerous of her tenants were illegal aliens when immigration 'showed up'" and took no steps after officials "repeatedly" warned her that many tenants "were not properly documented." *Id*. at 1003. This Court affirmed the conviction, concluding that Section 1324(a)(1)(A)(iii)'s "knowing or in reckless disregard" element was satisfied. But *Aguilar* does not support the district court's holding in this case that residential landlords like Waples who lease housing to undocumented individuals, without more, must proactively verify their tenants' immigration statuses or risk being prosecuted. The Department of Justice does not prosecute residential landlords merely because they do not, in the normal course of business, check the immigration status of every person living in their rentals.

The district court's textual analysis of Section 1324(a)(1)(A)(iii) also falls short. The court focused solely on the dictionary definition of "harboring" and failed to consider the statute's "knowing or in reckless disregard" requirement. A more complete analysis of all the elements would have revealed that Section 1324(a)(1)(A)(iii) is not a strict liability statute.

Accordingly, the Court should reverse and remand the district court's grant of summary judgment on plaintiffs' FHA disparate impact claim so that the court can analyze properly whether Waples was in fact at risk for criminal liability under Section 1324(a)(1)(A)(iii) based on what it knew about its tenants' immigration statuses when it adopted and enforced its immigration-verification policy; absent that risk, Waples cannot rely on this interest to satisfy its burden under step two.

ARGUMENT

THE DISTRICT COURT ERRED IN CONCLUDING THAT WAPLES SATISFIED ITS BURDEN UNDER STEP TWO OF THE FHA'S DISPARATE IMPACT BURDEN-SHIFTING TEST BECAUSE THE COURT FAILED TO DETERMINE WHETHER WAPLES HAD THE REQUISITE MENS REA TO BE SUBJECT TO CRIMINAL LIABILITY FOR HARBORING

Under *Texas Department of Housing & Community Affairs* v. *Inclusive Communities Project, Inc.*, once it is established that a policy caused or predictably will cause a discriminatory effect on a protected class, a defendant must prove that the challenged policy "is necessary to achieve a valid interest." 576 U.S. 519, 541 (2015); see also 24 C.F.R. 100.500(c)(2) (2013) (providing that the defendant "has

the burden of proving that the challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests"). Although avoiding criminal liability is a valid interest, the district court in this case could not determine whether Waples's enforcement of its verification policy was "necessary" to avoid a reasonable risk of criminal liability for harboring the undocumented plaintiffs without finding based on the record that, at the time Waples adopted and enforced its policy, Waples knew or recklessly disregarded its tenants' unlawful immigration statuses. See 8 U.S.C. 1324(a)(1)(A)(iii) (making it a criminal offense to "knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, conceal[], harbor[], or shield[] from detection * * * such alien in any place, including any building or any means of transportation"). The district court not only failed to make that finding, but it misconstrued the federal anti-harboring statute.

1. To convict a landlord for harboring under Section 1324(a)(1)(A)(iii), one of the things that the government must prove beyond a reasonable doubt is that the landlord knew or recklessly disregarded the fact that a tenant was unlawfully present in the United States. 8 U.S.C. 1324(a)(1)(A)(iii). Reckless disregard in Section 1324(a)(1)(A)(iii) means a defendant is "aware of but consciously ignores facts and circumstances clearly indicating that an individual is an undocumented alien." *United States* v. *Aguilar*, 477 F. App'x 1000, 1002 (4th Cir. 2012)

(unpublished); see also *United States* v. *Perez*, 443 F.3d 772, 781 (11th Cir. 2006) (defining reckless disregard as "deliberate indifference to facts which, if considered and weighed in a reasonable manner, indicate the highest probability" that a person was unlawfully in the United States); Model Penal Code § 2.02(2)(c) (1962) ("A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or results from his conduct.").

The cases that the district court cited in its opinion all make clear that in order for a defendant to be held criminally liable under Section 1324(a)(1)(A)(iii), there must, at a minimum, be evidence that the defendant knew or was aware of facts indicating that the harbored individual was undocumented. JA1523. For example, the district court cited *Aguilar*, 477 F. App'x at 1002, which affirmed the conviction of a landlord for harboring where substantial evidence supported the jury's finding that the defendant recklessly disregarded "facts and circumstances" indicating that the tenants were undocumented. JA1523. Likewise, the Eighth Circuit in *United States* v. *Tipton*, 518 F.3d 591, 595 (8th Cir. 2008), affirmed a harboring conviction based on evidence showing, among other things, that the defendants failed to withhold federal income tax or contribute to unemployment insurance for six of their employees, paid them in cash significantly below minimum wage, and drove them to and from work from an apartment that

defendants maintained for them. JA1523. The court of appeals held that such circumstantial evidence was "an adequate basis for the jury to conclude that [defendants] knew or recklessly disregarded the fact that the aliens were unlawfully in the country." *Tipton*, 518 F.3d at 595. As these cases illustrate, criminal liability under Section 1324(a)(1)(A)(iii) requires evidence of specific facts establishing a defendant's knowledge or reckless disregard of unlawful presence.[5]

Despite citing these cases, the district court failed to determine whether Waples was aware of facts indicating that any of its tenants was undocumented. On the contrary, in the background section of its opinion, the court cited the deposition testimony of a Waples's corporate designee that Waples started enforcing its policy in 2015 because of an incident involving a registered sex offender—not an undocumented immigrant—who was a tenant at another mobile home park that Waples operated. JA1513 n.2; see also Doc. 138, at 5.[6] The

[5] The district court also cited *Ricchio* v. *McLean*, 853 F.3d 553 (1st Cir. 2017), which involved a civil sex trafficking statute, 18 U.S.C. 1595(a), containing a similar mens rea element. JA1523. The court of appeals in that case found that allegations of defendants' knowledge of facts indicating that force or threats of force would be used to cause the victim to engage in commercial sex acts were sufficient to withstand a motion to dismiss. *Ricchio*, 853 F.3d at 556-558.

[6] In that same testimony, Waples's corporate designee further admitted that he was not aware of anything "specific" that would subject Waples to criminal or civil liability for leasing to undocumented individuals. JA513-514.

district court did not even credit Waples's argument that it risked being accused of recklessly disregarding the undocumented plaintiffs' immigration statuses based on allegations in plaintiffs' complaint that "a large percentage of undocumented persons in the relevant geographic area are Latinos" and that "undocumented immigrants 'cannot obtain traditional home mortgages.'" JA1433-1434 (citing Compl. 11-14 (JA56-59)). But this argument also was insufficient to satisfy Waples's burden that its immigration verification policy was "necessary" to avoid a reasonable risk of criminal liability for harboring. *Inclusive Communities*, 576 U.S. at 541. Rather, the district court needed to determine whether Waples plausibly satisfied the "knowing or in reckless disregard" element in Section 1324(a)(1)(A)(iii) based on facts in the record regarding what it knew at the time it started enforcing its policy, not based on allegations in the complaint regarding the general characteristics of the local undocumented community.

2. The district court purported to base its ruling on this Court's unpublished decision in *Aguilar* (see JA1522-1524), but it failed to recognize that the facts of *Aguilar* were materially distinguishable and misconstrued the Court's opinion. Unlike Waples, a commercial landlord, the landlord in *Aguilar* rented rooms in her house to individuals whom she had specific reason to know to be undocumented. See *Aguilar*, 477 F. App'x at 1003. Indeed, the landlord admitted at trial that she knew this and "took no steps to ascertain the status of her tenants" after being

warned "repeatedly" by officials that "numerous of her tenants were not properly documented." *Ibid.* This Court therefore upheld the landlord's conviction because there was "substantial evidence" that the landlord knew or recklessly disregarded her tenants' unlawful status, as required for a harboring violation under Section 1324(a)(1)(A)(iii), see *ibid.*, not solely because, as the district court stated, the landlord "leased housing to unauthorized immigrants for profit." JA1523. The district court found no similar facts regarding Waples's knowledge or reckless disregard of its tenants' immigration status at the time it adopted and enforced its verification policy. Moreover, the court erred in reading *Aguilar* to mean that a landlord's mere failure to proactively verify the immigration status of tenants, without more, will constitute "reckless disregard" under Section 13424(a)(1)(A)(iii). Rather, *Aguilar* found that the defendant satisfied the statute's "knowing or reckless disregard" requirement with respect to her tenants' lawful presence only "after" she was "repeatedly" "warned by officials that numerous of her tenants were not properly documented." 477 F. App'x at 1003.

The district court therefore erred when it stated that the facts of *Aguilar* "make it clear that the Department of Justice will pursue criminal charges against a lessor of housing who does not take affirmative steps to verify the authorization of [undocumented] immigrants—potentially like the Defendants in the present case." JA1523-1524. The Department does not prosecute residential landlords merely

because they do not, in the normal course of business, verify the immigration status of every person living in their rentals. As explained, the facts supporting the "knowing or reckless disregard" element in *Aguilar* are significantly different than the facts in this case. Here, the district court failed to conduct the fact-intensive analysis necessary to determine whether Waples could be potentially held liable under Section 1324(a)(1)(A)(iii). Indeed, because the anti-harboring provision also applies to the transportation of unlawfully present individuals, construing Section 1324(a)(1)(A)(iii) as the district court did could mean that cab drivers could be required to ask passengers for documentation of their legal status or risk prosecution. This is not the law.

3. The district court's textual analysis of Section 1324(a)(1)(A)(iii) similarly falls short. The court stated that the "language used within the anti-harboring statute also supports a finding that [Waples] could face criminal liability," and then went on to cite the Black's Law definition of "[h]arboring." JA1524. But the court overlooked the statute's "knowing or in reckless disregard" requirement. A more complete analysis of all the elements would have revealed that Section 1324(a)(1)(A)(iii) is not a strict liability statute and that the mere act of renting housing, even in an area with a large immigrant population, is not enough to expose a housing provider to potential criminal liability for harboring. Rather, an act constitutes illegal harboring if, among other things, it is done "knowing[ly] or

in reckless disregard of the fact that an alien has come to, entered, or remains in the United States." 8 U.S.C. 1324(a)(1)(A)(iii).[7]

* * *

In short, absent evidence that Waples knew or recklessly disregarded its tenants' immigration statuses, Waples faced no risk of prosecution under Section 1324(a)(1)(A)(iii), and its policy would not "serve[], in a significant way," a valid interest in avoiding a risk of criminal liability for harboring. See *Southwest Fair Hous. Council, Inc.* v. *Maricopa Domestic Water Improvement Dist.*, 17 F.4th 950, 967 (9th Cir. 2021) (defining "business necessity" under step two of the FHA's burden-shifting test) (citation omitted). In other words, Waples's policy would not be "necessary" under step two of the FHA's burden-shifting test for disparate impact claims and would not justify a policy that has a discriminatory effect based on a protected class. See *Inclusive Communities*, 576 U.S. at 541; see also 24 C.F.R. 100.500(c)(2) (2013). The district court's failure to properly analyze

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[7] Cases from other circuits have held that the mere act of renting or providing housing to a known undocumented immigrant does not satisfy the actus reus requirement for "harboring" under Section 1324(a)(1)(A)(iii), though there is disagreement among the circuits as to precisely what more is required, a question about which the United States takes no position here. See, *e.g.*, *United States* v. *McClellan*, 794 F.3d 743, 744, 750 (7th Cir. 2015); *Delrio-Mocci* v. *Connolly Props., Inc.*, 672 F.3d 241, 246 (3d Cir.), cert. denied, 568 U.S. 821 (2012); *Tipton*, 518 F.3d at 595. Because the district court overlooked the statute's "knowing or in reckless disregard" element, this Court can resolve this case based solely on that error.

Waples's potential criminal liability risk based on facts in the record about its knowledge at the time it began enforcing its policy was error.

CONCLUSION

For the foregoing reasons, this Court should reverse and remand for further proceedings the grant of summary judgment on plaintiffs-appellants' FHA claim.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B)(i) because it contains 4,648 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared in Times New Roman 14-point font using Microsoft Office Word 2019.

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